Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

BRIAN CHARLES BRAU,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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53 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a defendant, in contesting the allegations of a presentence investigation report attributing quantities of marijuana to him as a member of a conspiracy, presented uncontroverted evidence which carried his burden of proof in demonstrating the contents of the presentence investigation report were untrue, inaccurate and unreliable; therefore, warranting a ruling by the trial court correcting the allegations contained within the presentence investigation report.

2. Whether a defendant, who presents evidence controverting or disputing the correctness of the factual allegations of a presentence investigation report, is entitled to factual findings by the court in order to resolve the factual dispute or whether the allegations of the presentence investigation report in dispute are sufficient if implicitly adopted by the court.

3. Whether a defendant can ever successfully dispute the factual allegations of a presentence investigation report by presenting uncontroverted evidence from the alleged source of the information contained within the presentence investigation report or whether the

initial factual allegations contained within the presentence investigation report will always be sufficient to overcome any evidence presented by a defendant.

4. Whether the credibility of a witness called by a defendant to dispute the factual allegations of a presentence investigation report, who served as the basis for the information contained within the presentence investigation report, and who has previously served as a primary witness in the trial of the co-defendants to the indictment, can be called into question, without controverting evidence, and therefore defeat the defendant's contest of the factual allegations of the presentence investigation report.

LIST OF PARTIES

The parties to the proceedings below and in this Court are Petitioner **BRIAN CHARLES BRAU** and Respondent **UNITED STATES OF AMERICA**.

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

BRIAN CHARLES BRAU,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, BRIAN CHARLES BRAU, respectfully prays that a Writ of Certiorari issue to review the Judgment of

the Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not to be reported, but is attached hereto as Appendix A. Further, the order on Motion for Rehearing is attached hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 25, 1994. A Petition for Rehearing was filed on behalf of Petitioner and was denied on September 20, 1994 without written opinion. the jurisdiction of this court is invoked pursuant to **28 U.S.C.A. sec. 1254(1) (1993)**.

STATUES AND RULES INVOLVED

United States Sentencing Guideline Section 1B1.3:

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i)the base level offense where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references to Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;...

Federal Rule of Criminal Procedure 32(c)(3)(D):

> (D) If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted, make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons.

STATEMENT OF THE CASE

Brian Charles Brau, hereinafter referred to as Petitioner, was originally indicted on June 3, 1993, in an eight count indictment in which the Petitioner was named in count 2 only, alleging a conspiracy among named co-defendants to possess with intent to distribute in excess of 100 kilograms of marijuana (R.I 7). On August 24, 1993, a plea agreement was

reached between the Government and the Petitioner, in which the Petitioner would waive indictment and plead guilty to a one count superseding information charging him with possessing with intent to distribute a quantity of marijuana on November 2, 1992 (R.I 111, 118).

The factual basis for the plea was that the Petitioner, on November 2, 1992, in the company of Roy Thomason and Joyce Price, traveled to a location near Redford, Texas in a motor home leased from Cruise America. At that location, Roy Thomason loaded approximately 400 pounds of marijuana into the motor home and then transported it to the Dallas, Texas metroplex. In Dallas, Texas, Ruben Chapa accepted delivery of the marijuana and paid Roy Thomason $50.00 per pound for transporting the marijuana to Dallas. Ruben Chapa paid nothing to the Petitioner (R.I 113). Following the Petitioner's plea of guilty to the one count information, the case was set for sentencing on November 1, 1993 (R.I 40).

Prior to the sentencing on November 1, 1993, a presentence investigation report was completed by the United States Probation Office for the Western District of Texas (R.I 119). The presentence investigation report set a base offense level of 30 (R.II 2). The offense level was based upon attributing to the Petitioner 1,600 pounds (725.76 kilograms) of marijuana (R.II 3). The Petitioner objected to this offense level based upon this amount of marijuana in written objections (R.III 3). The Petitioner plead to a superseding information and accompanying factual resume which involved the transportation of approximately 400 pounds of marijuana on November 2, 1992 which would establish a base offense level of 26 (R.I 113, 111). The probation office replied to the objections of the Petitioner in an Addendum to the Presentence Investigation Report by stating that the Petitioner's offense level was derived based upon information from Roy Virgil Thomason and Joyce Roller Price in regard to the smuggling

activity. The petitioner advised the court that he was, at the time of the alleged offense, cohabiting with Joyce Roller Price and was prepared to call witnesses to dispute the facts set forth in the Addendum to the Presentence Investigation Report filed by the United States Probation office (R.II 4).

At sentencing, the United States District Court first began dealing with the objections filed by the Petitioner to the presentence investigation report prepared by the probation office (R.II 2). After Petitioner voiced orally to the court his objections, and the court then allowed the Petitioner to produce evidence supporting his objections to the factual allegations of the presentence investigation report (R.II 4).

Joyce Roller Price was called as a witness on behalf of the Petitioner (R.II 4). Ms. Price testified that in September, October and November of 1992, she and Petitioner made three trips to the Big Bend area of Texas from Dallas (R.II 4-5). On the first trip made in September, there was no marijuana

transported to Dallas from the Big Bend area (R.II 5). On a trip in October, marijuana was brought back to Dallas from the Big Bend area, but that the Petitioner had no knowledge of that fact (R.II 5). On November 2, 1992, there was a trip to the Big Bend area of Texas and the Petitioner learned on the return trip that marijuana was being transported back to Dallas from the Big Bend area (R.II 5-6). Upon learning of that fact, the Petitioner ceased cohabiting with Ms. Price (R.II 6). The Petitioner was never paid any money for being present during the transportation of marijuana from the Big Bend area (R.II 6). On cross examination, Ms. Price denied the Petitioner's knowledge of any prior trips to the Big Bend area for the purpose of obtaining marijuana (R.II 6-9). Specifically, on cross examination, Ms. Price was asked by the Government as follows:

Q: Ms. Price, in fact you and Mr. Brau went down there in April of 1992, did you not?

A: No, sir...

Q: These were entered into evidence as Government's exhibits 329 and 330, and in fact reflect that you and Mr. Brau rented a professional RV from Professional Sales and you had the RV fixed at the Warfield Truck Stop in Midland, Texas on April 14, 1992?

A: That's correct.

Q: So you did go make a trip to the Big Bend in April of 1992; right?

A: We went to, what is the Fort that is down there in the mountains?...

A: Fort Davis...

A: Fort Davis, we went to Fort Davis and the observatory (R.II 6-7).

No other witnesses were called by the Petitioner or the Government regarding this issue at sentencing (R.II 10). At the conclusion of the testimony, the court overruled the Petitioner's objection to the offense level based on the evidence

which the court had heard (R.II 10). The Petitioner was then sentenced pursuant to the presentence investigation report that calculated the base offense level of 30 based upon 1,600 pounds (725.76 kilograms) of marijuana being attributable to his conduct.

The jurisdiction of the United States District Court for the Western District of Texas, the court of the first instance, was invoked pursuant to **18 U.S.C.A. sec. 3231 (1985)**.

REASONS FOR ALLOWANCE OF THE WRIT

I.

Pursuant to **U.S.Sup.Ct. Rule 10.1**, the Petitioner contends that review on Writ of Certiorari is warranted based on the fact that the opinion of the United States Court of Appeals for the Fifth Circuit on direct appeal of Petitioner's conviction regarding the burden of proof required to establish factual inaccuracies and the requirement of finding by the court

to resolve the allegations was in conflict with decisions of other United States Courts of Appeals and this court. Further, Petitioner believes that the decision of the United States Court of Appeals on direct appeal of his conviction so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision in deciding the issues contained herein.

II.

On direct appeal, the United States Court of Appeals for the Fifth Circuit noted that the United States District Court overruled the Petitioner's objection to the factual allegations by stating:

> "I think anybody with Mr. Brau's perception, anybody with his intelligence, anybody that is the least bit aware of things is going to know that marijuana is being hauled. I don't think you stay in a motel and let your girl friend [sic] or whoever you are living with go off and then later on say, well, I didn't know there was any marijuana there, That just stretches my beliefs too far." (Opinion at 3 note 2)

The Court of Appeals also correctly noted that the District Court did not expressly adopt the presentence investigation report at sentencing but it did utilize the presentence investigation report's offense level, criminal history category and respective sentencing range. It was also noted that the United States District Court marked the box in the judgment indicating that it had adopted the presentence investigation report.

The Court of Appeals for the Fifth Circuit held that a District Court's factual findings are reviewed only for clear error. **United States v. Puig-Infante, 19 F.3d 929 (5th Cir. 1994) pet. for cert filed, (U.S. June 22, 1994)(NO. 93-9760).** The court further noted that application of the guidelines, however, is reviewed by the Court on appeal de novo. **United States v. Mejia-Orosco, 867 F.2d 216 (5th Cir. 1989), cert. denied, 492 U.S. 924 (1989).**

The Court of Appeals recognized that a defendant can

present information to a sentencing judge taking issue with factual allegations and thereafter bears the burden of demonstrating that the information cannot be relied upon because it is materially untrue, inaccurate or unreliable. **United States v. Angulo, 927 F.2d 202 (5th Cir. 1991).** The Court recognized that the Petitioner presented testimony to rebut the factual allegations contained in the presentence investigation report and that the disputed facts created an issue of credibility for the District Court to decide. **United States v. Sherbak, 950 F.2d 1095 (5th Cir. 1992).**

However, thereafter, the Court of Appeals simply stated that the Petitioner failed to meet his burden in demonstrating the inaccuracy of the presentence investigation report and that the trial court, by adopting the presentence investigation report by reference in its judgment, sufficiently resolved the factual dispute raised by the Petitioner against him. This was allowed without the benefit of specific findings

or through the efforts of the government in producing any controverting evidence whatsoever. Citing **United States v. Carreon, 11 F.3d 1225 (5th Cir. 1994)**.

III.

As the Court of Appeals for the Fifth Circuit originally noted in its opinion, the entire basis of the presentence investigation report to attribute 1,600 pounds of marijuana was through the information obtained from Joyce Roller Price and Roy Thomason (Opinion at 4). The witness called by the Petitioner was the source of this information, Joyce Roller Price (R.II 4). The court further correctly noted that Joyce Roller Price testified that only three trips rather than four were made in the autumn of 1992, and that the last trip occurred in November (R.II 5). Ms. Price testified that no marijuana was transported during the September trip and that the Petitioner was not aware of the presence of marijuana during the October trip (R.II 5). Ms. Price testified that the Petitioner learned

that marijuana was being transported only during the November trip and after this trip, the Petitioner ended his relationship with her (R.II 6).

The Court of Appeals incorrectly characterized Joyce Roller Price as being impeached by the government regarding a fourth trip in April of 1992 (Opinion at 3). As demonstrated by the testimony quoted in the Statement of the Case, Ms. Price only admitted to a prior trip to the Fort Davis and observatory area of Texas (R.II 7). This series of questions and answers is incorrectly characterized by the court and the government as an impeachment of an additional trip to the Big Bend area (Opinion at 3). In fact, Ms. Price's response to the questions are correct in that they did not go down "there," meaning the Big Bend area, in April of 1992. Ms. Price made clear that the trip was to the mountains and Fort Davis and not the Big Bend area (R.II 6-7).

Further, there was never any impeachment of Ms.

Price regarding her statements as to the amounts of marijuana involved in the trips in September, October and November of 1992, nor was the testimony of Roy Thomason or any other person introduced to substantiate the allegations of the presentence investigation report. Even if it is argued that Ms. Price was impeached as to the trip of April, 1992, there was no impeachment of her regarding the amounts of marijuana involved. The significance of this is that Joyce Roller Price testified as a witness for the government in the trial involving co-defendants named in the same indictment as the Petitioner (see **United States v. Ruben Chapa-Ibarra, NO. 93-8781** now pending before the United States Court of Appeals for the Fifth Circuit). The Court is respectfully requested to take judicial notice of her use by the government in obtaining convictions against the co-defendants and therefore their reliance on the credibility of her testimony in those proceedings. **United States v. Hawkins 566 F.2d 1066 (5th**

Cir. 1978); Massachusetts v. Westcott 431 U.S. 322 (1977); Fed. R. Evid. 201 (b) and (f). The fact that Joyce Roller Price's testimony and credibility were used by the government to convict other individuals was well known to the trial court. He presided over both the trials of the co-defendants and the sentencing of the Petitioner.

The ruling of the trial court which was affirmed by the United States Court of Appeals for the Fifth Circuit is in conflict with other decisions of this court and other Courts of Appeals in allowing the allegations of the presentence investigation report to stand in the face of uncontroverted evidence produced by a defendant challenging the factual allegations contained in the presentence investigation report. See: **United States v. Prescott, 920 F.2d 139 (2nd Cir. 1990); United States v. McDowell, 888 F.2d 285 (3rd Cir. 1989); United States v. Engleman, 916 F.2d 182 (4th Cir. 1990); United States v. Goff, 907 F.2d 1441 (4th Cir.);**

United States v. Hodges, 935 F.2d 766 (6th Cir. 1991); United States v. Spillman, 924 F.2d 721 (7th Cir. 1991); United States v. Howard, 894 F.2d 1085 (9th Cir. 1990); United States v. Reid, 911 F.2d 1456 (10th Cir. 1990), but see: **United States v. Lovell, 715 F.Supp. 854 (W.D. Tenn. 1989); Morphew v. United States, 909 F.2d 1143 (8th Cir. 1990); United States v. Malbrough, 922 F.2d 458 (8th Cir. 1990).** Further, the Petitioner herein carried his burden of proof to demonstrate the inaccuracies and the unreliability of the factual allegations regarding the amounts of marijuana attributable to him for the purposes of establishing the guidelines under which he would be sentenced.

The Petitioner was entitled to have the District Court make specific findings based upon his objections and factual dispute as to the allegations contained within the presentence investigation report. **United States v. Montanye, 996 F.2d 190 (8th Cir. 1993); United States v. Coleman, 990 F.2d**

419 (8th Cir. 1993); United States v. Rosado-Ubiera, 947 F.2d 644 (2d Cir.1991); Fed.R. Crim.Proc. 32(c)(3)(D). Compare, **United States v. White, 5 F.3d 544 (9th Cir. 1993); United States v. Rigby, 896 F.2d 392, 394 (9th Cir. 1990); United States v. Corley, 909 F.2d 359, 362 (9th Cir. 1990).**

The ruling of the United States Court of Appeals for the Fifth Circuit upholding the implicit adoption by the District Court of the presentence investigation report in lieu of these specific factual findings is in conflict with the decisions of other Courts of Appeals and this court. To allow such a ruling to stand would allow the factual allegations of a presentence investigation report to always control even in the face of an objection and presentation of uncontroverted evidence in opposition to the factual allegations contained therein. Such a ruling cannot stand and it is necessary that this court exercise its supervisory powers to prohibit the existence of such precedent.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Petition for Writ of Certiorari be, in all things, granted.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition has been forwarded to the Hon. Diane D. Kirstein, Assistant United States Attorney, Appellate Section, Western District of Texas, 601 N.W. Loop 410, Suite 600, San Antonio, Texas 78216, and to the Solicitor General, U.S. Department of Justice, Washington, DC, 20530, United States mail, postage prepaid.

SIGNED this the 19th day of December, 1994.

WILLIAM A. BRATTON, III

APPENDIX

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A-1

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8787
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BRIAN CHARLES BRAU,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas
(P-93-CR-54-10)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

Pursuant to a plea agreement, Bryan Charles Brau pleaded guilty to an information charging him with possession with the intent to distribute marijuana, in exchange for the dismissal of a count in a multi-count indictment charging Brau and others with conspiracy to possess with the intent to distribute over 100 kilos

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*Local Rule 47.5 provides: "The publication of opinions that have no precendential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of marijuana. Brau challenges his sentence in this appeal. The facts of the offense are as follows: Ruben Chapa-Ibarra, Jr. ran a smuggling enterprise, transporting marijuana from the Big Bend area of Texas to the Dallas, Texas metroplex. Brau's girlfriend, Joyce Roller Price, became involved in the transportation of the marijuana loads, using recreational vehicles as the primary method of transportation, from 1987 through November 1992. She recruited her brother, Roy Virgil Thomason, to assist her in November 1988. Brau's involvement occurred in 1992. Brau entered his plea of guilty on August 24, 1993 and was sentenced on November 1, 1993.

The probation officer set Brau's base offense level at 30, based upon the transportation of 1,600 pounds (725.7 kilos) of marijuana on four separate trips to the Big Bend area, including the trip on November 2, 1992, the basis of the count

of conviction. 1 Brau objected to this, arguing that he had no knowledge of any marijuana being transported on any trip except the November 2nd one. At sentencing, Brau reasserted his dispute with the PSR's facts as to the number of trips and the resulting amount of drugs.

Price testified that there were only three trips made in the autumn of 1992, not four, and that the last trip occurred in November. She claimed that no marijuana was transported during the September trip. The October trip, she said, did involve the transportation of marijuana but Brau was not aware of its presence. She said Brau learned that marijuana was being transported during the November trip. After this trip, Price said

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1 The probation officer used the 1992 edition of the Guidelines.

Brau ended his relationship with her On cross-examination, Price adhered to her story that there were only three autumn trips and that Brau participated in the third one only. Price initially denied that she and Brau traveled to the Big Bend area during April 1992. After the presentation of exhibitory evidence to the contrary, however, Price admitted that they did in fact make a trip during that month, but she stated that the trip was purely recreational in purpose. Price also denied or did not recall making certain statements to law enforcement agents and to Brau.

The district court overruled the objection, finding implausible the scenario that Brau was unaware of his girlfriend's activities while on the Big Bend trips. 2 The district court did not expressly adopt the PSR at sentencing, but it did utilize the PSR's offense level, criminal history category, and respective sentencing range. Also, in the judgment, the court marked the box indicating that it had adopted the PSR. After granting the Government's motion for downward departure, the court sentenced Brau to 48 months imprisonment.

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2 After overruling the objection, the district court stated, "I think anybody with Mr. Brau's perception, anybody with his intelligence, anybody that is the least bit aware of things is going to know that marijuana is being hauled. I don't think you stay in a motel and let your girl friend [sic] or whoever you are living with go off and then later on say, well, I didn't know there was any marijuana there, That just stretches my beliefs too far."

OPINION

Brau argues that the district court erred in attributing 1,600 pounds of marijuana to him in setting his base offense level. By assuming a literal interpretation of what the district court said in overruling his objections, Brau argues that the district court improperly applied § 1B1.3 and failed to make the required findings. A district court's factual findings are reviewed for clear error. See United States v. Puig-Infante, 19 F.3d 929, 942 (5th Cir. 1994), pet. for cert. filed, (U.S. June 22, 1994)(No. 93-9760). "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." Id. Application of the guidelines, however, is reviewed de novo. See United States v. Mejia-Orosco, 867 F.2d 216, 218 (5th Cir.), cert. denied, 492 U.S. 924 (1989).

Section 2D1.1(a)(3), used in determining the base offense level for drug trafficking offenses, utilizes two quantities of drugs in setting the base offense level: "drugs with which the defendant was directly involved [under § 1B1.3(a)(1)(A)], and drugs that can be attributed to the defendant in a conspiracy as part of his 'relevant conduct' under § 1B1.3(a)(1)(B)." United States v. Carreon, 11 F.3d 1225, 1230 (5th Cir. 1994). "Relevant conduct" under subsection (a)(1)(B) is "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." § 1B1.3(a)(1)(B). The PSR stated that Brau accompanied Price and her brother on their last four trips, in the autumn of 1992, transporting a total of 1,600 pounds of marijuana. Price paid Brau for his efforts. This information was based upon statements made by Price and her brother to law enforcement agents.

In setting the base offense level, reference was given both subsections, (a)(1)(A) and (a)(1)(B); see also § 1B1.3, comment. (n.2(a)(1)) (noting that it is possible for conduct to fall under more than one subsection of the guideline). Although the PSR referred to subsection (a)(1)(B), the report failed to specify when Brau became aware of Price's marijuana smuggling or when he agreed to undertake the joint criminal activity.

"[A] presentence report generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the sentencing guidelines." United States v. Alfaro, 919 F.2d 962, 966 (5th Cir. 1990) (footnote omitted). "If information is presented to the sentencing judge with which the defendant would take issue, the defendant bears the burden of demonstrating that the information cannot be relied upon

because it is materially untrue, inaccurate or unreliable." United States v. Angulo, 927 F.2d 202, 205 (5th Cir. 1991); see United States v. Young, 981 F.2d 180, 185 (5th Cir. 1992), cert. denied, 113 S. Ct. 2454, 2983 (1993). Brau presented to testimony of Price to rebut the PSR's information that Brau was involved in four trips and 1,600 pounds of marijuana. As such, the disputed facts created an issue of credibility for the district court to decide. See United States v. Sherbak, 950 F.2d 1095, 1101 (5th Cir. 1992).

We view the district court's ruling on the objections as a determination that Price's testimony was not credible. Thus, Brau failed to meet his burden in demonstrating the inaccuracy of the PSR. See Angulo, 927 F.2d at 205. The district court's statements at sentencing (utilizing the offense level and sentencing range from the PSR), as well as its indication in the judgment that it adopted the PSR, constitute adoption of the

PSR by reference.

By adopting the PSR, the district court adopted the PSR's finding that Brau participated in the joint activity of four trips involving 1,600 pounds of marijuana and was paid for his efforts. Thus, any question as to the lack of specific findings concerning when Brau agreed to the jointly-conducted activity, is answered by the district court's reliance on the PSR. See Carreon, 11 F.3d at 1231 ("allow[ing] the district court to make implicit findings by adopting the PSR" (footnote omitted)). Brau's conduct falls under subsection (a)(1)(A), and not under subsection (a)(1)(B), and therefore findings regarding foreseeability and time of commencement of relevant conduct are unnecessary.

AFFIRMED.

RULING OF THE COURT

THE COURT: Anything further?

MR. BRATTON: As far as objections 3, 4, 5, 6, 7, 8, and 9, no, your Honor. Now, a housekeeping matter. Objection No. 1, we attempted at the time of arraignment for the magistrate to change the spelling of his name to B-r-i-a-n and I think we were advised by the probation officer that has to be done by the clerk's office. We can still do that.

THE COURT: His first name is B-r-i-a-n- as opposed to B-r-y-a-n?

MR. BRATTON: Right.

THE COURT: Okay. I will make the change.

MR. BRATTON: All right.

THE COURT: Anything else?

MR. BRATTON: No, your Honor, not as far as the objections go.

THE COURT: All right. Let the record reflect that I have heard the proffered testimony, and heard the testimony of Ms. Price in this connection. I will not allow the objection.

The total offense level will be 25, criminal history category of I. Anybody with --- and I will tell you why. I think anybody with Mr. Brau's perception, anybody with his intelligence, anybody that is the least bit aware of things is going to know that marijuana is being hauled. I don't think you stay in a motel and let your girl friend or whoever you are living with go off and then later on say, well, I didn't know there was any marijuana there. That just stretches my beliefs too far. I will not allow it.

Statutorily Mr. Brau could be given five years, the guidelines recommend 57 to 71 months, Supervised release by statute is 2 to 3 years, guidelines recommend 3 to 5 years. A fine of $250,000.00 could be imposed, the guidelines

recommend $10,000.00 to $100,000.00. I will accept the guidelines as being appropriate in this case, and the factual statements that are set out by Ms. Nunez on October 7, 1993. The other objections lodged by the defendant will not be allowed at this time.

Are you aware of any legal reason why I can not impose sentence, Mr. Bratton?

MR. BRATTON: No, your Honor.

THE COURT: Mr. Brau, may I hear from you, please?

THE DEFENDANT: Yes, sir. I realize my attorney is up here objecting to matters that I guess are technical to my sentencing. I realize that if it is a handful of marijuana or a cargo truck of marijuana, it is marijuana and it is wrong. What I did was wrong. When I found out I removed myself from the situation, did not have any more contact with, limited with Joyce and didn't have any more with Roy. I have made

a grave, devastating decision. I have embarrassed my family, I have embarrassed my friends. It is something that I will never be able to live down. I apologize strongly to the...

C-1

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-8787

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

BRIAN CHARLES BRAU,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

On Petition for Rehearing

(September 20, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

\S\ Harold R. DeMoss
United States Circuit Judge

REHG-2

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

D-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
PECOS DIVISION

JUDGMENT IN A CRIMINAL CASE

UNITED STATES OF AMERICA

V. P-93-CR-054(10)

BRYAN CHARLES BRAU
(True Name: Brian Charles Brau)

THE DEFENDANT:
_x_ pleaded guilty to count(s) one of a superseding information on August 24, 1993.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:
Title & Section:
18 USC 2 and
21 USC 841(a)(1)
Nature of Offense
Aiding and Abetting Possession with Intent to Distribute Marijuana
Date Offense Concluded
November 2, 1992
Count Number(s)
One (1)

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

x Count(s) two of the original indictment is dismissed on the motion of the United States.

x It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) one of the superseding information, which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines restitution, costs and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 453-41-7208
Defendant's Date of Birth: March 25, 1963

November 1, 1993
Date of Imposition of Sentence

\s\ Lucius D. Bunton
Signature of Judicial Officer
Lucius D. Bunton

Senior United States District Judge
Name & Title of Judicial Officer

November 1, 1993
Date

D-3

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of forty-eight (48) months.

_x_ The court makes the following recommendations to the Bureau of Prisons:
The federal Correctional Institution, Seagoville, Texas, OR, if eligible, the Male Intensive Confinement Center, Lewisburg, Pennsylvania, is recommended as the place of incarceration.

_x_ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,

The Defendant shall contact the UNITED STATES MARSHALL SERVICE, PECOS, TEXAS, not later than 10:00 a.m. on January 3, 1994, to ascertain to which institution he is to report and shall report as directed.

D-4

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

_x_ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
_x_ The defendant shall pay any fines that remain unpaid at the commencement of the tern of supervised release.
_x_ The defendant shall not possess a firearm or destructive device.

The defendant shall abide by the standard conditions of probation and supervised release recommended by the Sentencing Commission and amended by the United States District Judges for the Western District of Texas dated may 6, 1991.

For any unpaid balance of fine at the commencement of the term of supervised release, the defendant shall make monthly payments as directed by the United States Probation Office.

The defendant is required to provide to the United States Probation Officer access to any requested financial information.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state, or local crime. In addition:

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court to probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation office and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit the probation office to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

(14) the defendant shall not use or possess methadone for treatment purposes, or in any other manner, shape, or form, without express authority of the court.

D-7

FINE

The defendant shall pay a fine of $3,000.00 payable to the Clerk, U.S. District Court.

This fine plus any interest required shall be paid :
_X_ in full immediately.

For any unpaid balance of fine at the commencement of the term of supervised release, the defendant shall make monthly payments as directed by the United States Probation Office.

STATEMENT OF REASONS

_X_ The court adopts the factual findings and guidelines application in the presentence report.

GUIDELINE RANGE DETERMINATION

Total Offense Level:	25
Criminal History Category:	I
Imprisonment Range:	57 to 61 months
Supervised Release Range:	3 to 5 years
Fine Range:	$10,000 to $100,000

_X_ Fine is below the guideline range, because of the defendant's inability to pay a larger amount.

The sentence departs from the guideline range
_X_ upon motion of the government, as a result of defendant's substantial assistance.